



November 4, 2002

Ms. Beverly W. Irizarry
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2002-6268

Dear Ms. Irizarry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171686.

The Alamo Community College District (the "district"), which you represent, received a request for information relating to the requestor's administrative grievance against the district. Specifically, the requestor seeks the personnel files of four named individuals, information relating to criminal charges brought by the district against the requestor, a copy of an internal investigation concerning the requestor, and certain duty roster and work shift assignment information.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.108 of the Government Code, rule 503 of the Texas Rules of Evidence, and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and have reviewed the submitted information.

We note that a portion of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹ We note that the district requested and received a clarification of this request for information. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with a requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The submitted documents include a completed internal investigation. Therefore, as prescribed by section 552.022, the district must release the investigation file unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that make information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107). Thus, the district may not withhold the internal investigation under sections 552.103 and 552.107 of the Government Code.

You also contend that the investigation file is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

You state that the investigation file relates to a police investigation that did not result in a conviction or deferred adjudication. We note, however, that section 552.108 generally is not applicable to an internal administrative investigations involving law enforcement officers that did not result in a criminal investigation or prosecution. *See City of Fort Worth v. Cornyn*, ___ S.W.3d ___, 2002 WL 31026981 (Tex. App. 2002, no pet. h.); Open Records Decision No. 562 at 10 (1990); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). In this instance, although you contend that the investigation file relates to a criminal investigation of the requestor, upon review we determine that the investigation file at issue concerns an internal administrative investigation relating to personnel matters. Therefore, we determine that the district may not withhold any portion of the internal investigation file under section 552.108.

The attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City*

of *Georgetown*, 53 S.W.3d 328 (Tex. 2001). In order to withhold privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon review, we find that you have not demonstrated that the internal investigation at issue is a confidential communication protected by the attorney-client privilege. Accordingly, we determine that the district may not withhold the internal investigation under rule 503 of the Texas Rules of Evidence.

You contend that the statements of district employees contained in the internal investigation file are protected by privacy. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We find that the statements of district employees in the investigation file relate solely to the work behavior and job performance of public employees. Therefore, there is a legitimate public interest in the release of these statements. *See* Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute that individual's private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy); *see also* Open Records Decision No. 418 at 2 (1984) (information concerning citizen complaints regarding law enforcement and their resolution is of special interest to the public). Thus, we determine that the district may not withhold any information in the internal investigation file from disclosure under section 552.101 and common-law privacy. Consequently, we determine that the district must release the submitted internal investigation file to the requestor.

We next address your claim under section 552.103 with respect to the requested personnel information. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you inform us that the requestor has filed an administrative grievance against the district that is currently pending. Although you contend that the present request for information relates to the administrative grievance, you have not demonstrated that the grievance process is litigation for purposes of section 552.103. *See, e.g.*, Open Records Decision No. 588 at 7 (1991) (contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103). Therefore, we find you have not established that the district was involved in pending litigation on the date the district received this request for information.

You also contend that the requested information should be excepted from disclosure under section 552.103 on the basis that the information relates to reasonably anticipated litigation. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). You represent that the district reasonably anticipates litigation in

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

this case because the requestor hired an attorney and publicly threatened to file a lawsuit against the district. In support of this contention, you have submitted a letter from the requestor's attorney for our review as Exhibit 3. We find, however, that Exhibit 3 pertains to the administrative grievance of another district employee and makes only passing reference to the requestor. Upon review, we find Exhibit 3 provides no evidence to support the district's claim that the requestor is preparing to sue the district. Since you have not demonstrated that the requestor has taken any objective steps toward litigation, we determine that the district has not established that litigation is reasonably anticipated. Thus, the district may not withhold any of the information at issue under section 552.103 of the Government Code.

We next address your other claimed exceptions with respect to the requested personnel information. Initially, we note that this office previously ruled on the public availability of two personnel files included in the submitted information in Open Records Letter No. 2002-6047 (2002), issued October 24, 2002. The district submitted the personnel files of the requestor, Mr. Howard Crowell, and Deputy Chief Don Adams for our review in connection with that ruling. In this case, the district has submitted personnel files regarding these two individuals that are identical to the personnel files previously submitted and addressed in Open Records Letter No. 2002-6047. We determine that the district may rely on the ruling in Open Records Letter No. 2002-6047 with respect to the public availability of the personnel file of Deputy Chief Adams. We note, however, that in this case Mr. Crowell is the person making the public information request. Therefore, with respect to Mr. Crowell's personnel file, we find that the circumstances on which Open Records Letter No. 2002-6047 was based have changed. *See* Open Records Decision No. 673 (2001) (governmental body may only rely on previous determination of this office as long as the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling). We will therefore address your present arguments regarding the availability of Mr. Crowell's personnel file, as well as your arguments regarding the remaining two personnel files.³

You raise rule 192.5 of the Texas Rules of Civil Procedure with respect to the requested personnel information.⁴ This office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted by a governmental body. *See* Gov't Code § 552.006 (chapter 552 does not authorize withholding public information

³ We note that one of the personnel files you have submitted consists of a single document. If additional documents comprising this personnel file exist, the district must release such documents at this time. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

⁴ We note that you have withdrawn your claim of attorney-client privilege under section 552.107 of the Government Code and rule 503 of the Texas Rules of Evidence, and your claim under section 552.108, regarding the requested personnel information.

or limit availability of public information to public except as expressly provided by chapter 552); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 575 (1990) (Gov't Code § 552.101 does not encompass discovery privileges), 416 (1984). We note, however that the Texas Supreme Court has held that the Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" that makes information expressly confidential for purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001) ("We hold that if documents are privileged or confidential under the Texas Rules of Civil Procedure or Texas Rules of Evidence, they are within a 'category of information that is expressly made confidential under other law' within the meaning of section 552.022[.]"). In this instance, however, section 552.022 is not applicable to the personnel information that the district seeks to withhold under rule 192.5. Therefore, the district may not withhold any of the personnel information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

You claim that the requested personnel information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 also encompasses information that other statutes make confidential. We note that the submitted personnel information includes medical records, access to which is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked medical records in the personnel information that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

You also claim that the requested personnel information is excepted from disclosure under 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v.*

Harte-Hanks Texas Newspapers, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

You assert that the release of the requested personnel information would be an unwarranted invasion of the personal privacy of individuals who are the subjects of the information. As noted, one of the requested personnel files is that of the requestor. Pursuant to section 552.023 of the Government Code, the requestor has a special right of access to information that is excepted from public disclosure under laws intended to protect the requestor's own privacy interest as the subject of the information. Thus, the district may not withhold the requestor's personnel file on privacy grounds. *See also Open Records Decision No. 481 at 4 (1987)* (privacy theories not implicated when an individual asks governmental body to provide him with information concerning himself). Furthermore, having reviewed the remaining personnel information, we determine that you have not demonstrated that any of the information is outside the scope of legitimate public interest. *See Open Records Decision No. 444 at 3 (1986)* (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the district may not withhold the personnel files at issue under section 552.102 of the Government Code.

We note that some of the information at issue may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from public disclosure

information that relates to the home address, home telephone number, or social security number of the following person or that reveals whether the person has family members:

...

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable; [or]

...

(5) a commissioned security officer as defined by Section 1702.002, Occupations Code, regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable.

We have marked the information that the district must withhold if it relates to a peace officer under article 2.12 of the Code of Criminal Procedure or a security officer commissioned under section 1702.002 of the Occupations Code. We note that the district may not withhold information that relates to the requestor under section 552.117. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987).

To the extent that the individuals at issue are not peace officers or security officers, the section 552.117 information pertaining to these individuals may nevertheless be excepted from disclosure under section 552.117(1). Section 552.117(1) excepts from public disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the person has family members, if the current or former employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 at 5-6 (1994), 455 at 2-3 (1987). Thus, if the current or former employees whose information appears in the documents timely elected to keep this information confidential under section 552.024, the district must withhold the marked information under section 552.117(1) of the Government Code.

We note the requested information contains the requestor's driver's license number. Motor vehicle license and registration information is generally excepted from disclosure under section 552.130 of the Government Code. The requestor has a special right of access to his own driver's license number pursuant to section 552.023.

Finally, we note that the submitted information contains private e-mail addresses that are protected under section 552.137 of the Government Code. Section 552.137 protects the interests of third parties and provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." The private e-mail addresses that we have marked must be withheld under section 552.137 unless the persons to whom the e-mail addresses belong have affirmatively consented to its public disclosure.

In summary, the marked medical records may be released only as provided under the MPA. The district must withhold the home address, home telephone number, social security number, and family member information of a person other than the requestor who is either a peace officer under article 2.12 of the Code of Criminal Procedure or a security guard under section 1702.002 of the Occupations Code pursuant to section 552.117(2). The district may also be required to withhold home address, home telephone number, social security number, and family member information under section 552.117(1) if it pertains to a current or former employee of the district who timely requested confidentiality under section 552.024. The marked e-mail addresses must be withheld under section 552.137 of the Government Code. The remainder of the requested information must be released to the requestor. We note, however, that because this requestor has a special right of access to some of the information

at issue under section 552.023, in the event the district receives another request for this information from someone other than this requestor or his authorized representative, the district must ask this office for a decision whether the information is subject to public disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. R. Saldivar', with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 171686

Enc: Submitted documents

c: Mr. Howard Crowell
c/o Mr. Thad Harkins
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(w/o enclosures)